DIRECT APPEAL

NO. 04-1144

In The
Supreme Court of Texas

SHIRLEY NEELEY, IN HER OFFICIAL CAPACITY AS TEXAS COMMISSIONEROF EDUCATION, THE TEXAS EDUCATION AGENCY, CAROL KEETON STRAYHORN, IN HER OFFICIAL CAPACITY AS TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, AND THE TEXAS STATE BOARD OF EDUCATION,
Appellants

V.

WEST ORANGE-COVE CONSOLIDATED INDEPENDENT SCHOOL DISTRICT, COPPELL INDEPENDENT SCHOOL DISTRICT, LA PORTE INDEPENDENT SCHOOL DISTRICT, PORT NECHES-GROVES INDEPENDENT SCHOOL DISTRICT, DALLAS INDEPENDENT SCHOOL DISTRICT, AUSTIN INDEPENDENT SCHOOL DISTRICT AND HOUSTON INDEPENDENT SCHOOL DISTRICT,
Appellees

On Direct Appeal from the 250th District Court, Austin, Travis County, Texas

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ALVARADO APPELLEES' BRIEF

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ALVARADO APPELLEES' BRIEF

TO THE HONORABLE SUPREME COURT OF TEXAS:

STATEMENT OF THE CASE

Nature of the Case. Alvarado Appellants intervened in this case, originally filed in the 250th District Court of Travis County, and sued the State seeking a declaration that its system for financing school districts violated the efficiency, adequacy and suitability clauses of Article VII, section 1 of the Texas Constitution.

Course of the Proceedings. A trial to the court was held in this case between August 9, 2004 and September 15, 2004

Disposition of the Case: On November 30, 2004, Judge John Deitz granted judgment for Alvarado Appellants on every cause of action except the claim that the funding of school district operations is unconstitutionally inequitable. 3 CR 843, 848, FOF 435, 4 CR 943 The State filed its direct appeal to this Court on December 28, 2004. 4 CR 997

STATEMENT OF FACTS

Alvarado Appellees do not dispute the State's statement of facts and merely add thereto as enacted in 1993, Senate Bill 7 provided for the first output-based accountability system in the State's history. *Edgewood IV*, 917 S W.2d at 729 Although different in particulars, the basic structure of the accountability system remains the same as it was when originally enacted and is adequately described by the State in its brief. In one significant way, however, the current system is strikingly similar to the one contained in Senate Bill 7 In that original system, to be academically acceptable, a school district need only have had 25% of its students pass the Texas Assessment of Academic Skills ("TAAS") test. Alv Ex. 9021 at 10 Although that figure slowly increased, it only reached the minimal standard of 55% the year before the TAAS test was phased out. Alv Ex 9029 at 10. Under the present system, to be academically acceptable a school district need only have 50% of its students pass the reading and social studies portions of the Texas Assessment of Knowledge and Skills ("TAKS") test, 35% pass the math portion and 25% pass the science portion. Alv. Ex. 9031 at 7. However, despite these minimal requirements for school districts, all third, fifth and twelfth graders are expected to pass

some or all portions of the TAKS to simply promote to the next grade or graduate. TEX. EDUC. CODE ANN. §§ 28.0211(a)(1)-(20); 39 025(a).

The current system is also the same as its predecessors in the way it underreports dropouts. Despite the fact that the present accountability system allows a school to be academically acceptable if only three out of four its students graduate, Alv. Ex 9031 at 14, it does not accurately compile the number of students dropping out of Texas schools. FOF 649-50, 4 CR 971. Independent analyses by various governmental and non-governmental organizations has shown that the Texas Education Agency's ("TEA") reported dropout figures severely underreports the true number of dropouts in Texas. Alv. Ex. 9019 at 13-14, 26-29 and 39-40. These systemic issues with setting passing scores on assessment tests and dropout requirements result from the fact that since its inception the TEA has sought "to ensure that most districts and campuses fell upon the 'academically acceptable' side of the line, which is consistent with longstanding practice in Texas." FOF 32; 4 CR 864.

As originally enacted in 1993, Senate Bill 7 contained no separate equalized financing tier for new facilities. To obtain any equalized funds for new facilities, school districts had to use available taxing authority for maintenance and operations ("M&O") *Edgewood IV*, 917 S W.2d at 728 n 5

As currently structured, to obtain funds to construct new facilities or renovate existing ones, school districts must access monies through an interest and sinking fund ("I&S") tax rate of no more than $.50 on top of their M&O tax. FOF 382, 387, 400(a), 4 CR 935-96, 939, TEX. EDUC. CODE ANN. § 46.001-.013 (enacting the Instructional Facilities Allotment ("IFA")) This mechanism for equalizing funding for new bond issues provides for districts only those amounts up to a sum certain appropriated FOF 386, 394, 4 CR 936-37. If approved, a school district receives equalized funding up to $35 00 per penny of I&S tax effort per average daily attendance up to approximately $.07 of the $.50 of legal limit for each eligible bond issue approved. *Id.* §§ 46.003(h), .005.

Because IFA is not fully funded, but is limited to the amount appropriated, last biennium only 15 school districts received any equalized funds for new facilities projects. Edg Ex. 407 at 1 The current system provides no other equalization mechanism for those districts whose new bond issues are not approved under IFA.

Unlike M&O funds, school districts have no wealth cap for I&S purposes. Alv. Ex. 9004 at 7. Consequently, for the last biennium the richest district to apply for IFA enjoyed a 21.25 to 1 ratio for obtaining Tier

3 funds over the poorest district shut out of IFA funding. Edg. Ex. 407 at 1,

10.

SUMMARY OF THE ARGUMENT

The State argues that this Court should overrule its prior decisions holding that article VII, section 1 is justiciable and that school districts have standing to enforce its provisions The rule of law and *stare decisis* dictate that this Court overrule its decisions only for compelling reasons The State has come forward with no arguments that would convince one that this Court's prior decisions are flawed or in error on these issues Quite the contrary, existing case law fully supports the Court's prior rulings on these questions.

The State also argues that this Court should apply an equal-protection rational-basis test to its review of the State's educational system under article VII, section 1. The standards enunciated in this constitutional provision, however, are not appropriate for applying a level of scrutiny and this Court has never done so. The State contends that the trial court erred by holding that the Texas educational system is inadequate, unsuitable and inefficient. However, the trial court correctly found the state system inadequate because districts do not have sufficient operating funds to provide a general diffusion of knowledge to their students and property-poor districts have insufficient funds for the facilities necessary to provide their students with a general diffusion of knowledge

The education system is also unsuitable because the accountability system fails to ensure that districts provide a general diffusion of knowledge. The State has set its testing and dropout standards for districts so low as to abdicate its duty to ensure that school districts provide their students with a general diffusion of knowledge. Additionally, the State's system for calculating dropouts is systemically flawed to the extent that it does not accurately reflect the true rate of annual or longitudinal dropouts. As a result, the State's accountability system does not ensure its purpose of requiring districts to impart a general diffusion of knowledge to their students and is thus not constitutionally suitable.

Finally, the school finance system is unconstitutional because it provides no real equalized system for financing new facilities. Property-poor school districts that are ineligible for IFA funding, which is practically all of them, have no other option for obtaining equalized funding for new facilities that are urgently needed in order to provide their students with a general diffusion of knowledge. Due to the great disparities between property-rich and property-poor districts in the availability of funds to finance additional facilities, the financing system is unconstitutionally inefficient.

ARGUMENT

I. Efficiency, Adequacy and Suitability Present Justiciable Questions That School Districts Have Standing to Raise

The State argues that this Court should overrule its prior cases holding that the efficiency, adequacy[1] and suitability constitutionally required of our public school system present justiciable questions that school districts have standing to litigate Because this Court has correctly decided these issues contrary to the State's current position, *stare decisis* would dictate that these decisions remain undisturbed.

A. Stare decisis requires compelling reasons to overrule prior precedent

Not long after Texas joined the union, this Court held that the "rule of *stare decisis*, so far as it applies to decisions of our own Court, should not be disregarded, but on the fullest conviction that the law had been settled wrong." *Sydnor v. Gascoigne*, 11 Tex. 449, 455 (1854) Over one hundred years later the Court reiterated that it should overrule a prior decision "only if convinced that our prior decision was not sound, and that good reasons exist for overruling it." *Mitchell v. Mitchell*, 157 Tex. 346, 350, 303 S.W.2d 352, 355 (1957).

[1] The State attempts to argue that this Court has never determined that adequacy is justiciable by itself, but only in reference to a state property tax claim, and thus this is an open question However, if what constitutes a general diffusion of knowledge is justiciable with respect to an article VIII, §1-e claim, then that decision is equally applicable to an article VII, § 1 claim

Thus, the Court only disregards prior cases "for compelling reasons" and seeks to "adhere to our precedents for reasons of efficiency, fairness, and legitimacy." *Weiner v Wasson*, 900 S W.2d 316, 320 (Tex 1995) "[U]nder our form of government, the legitimacy of the judiciary rests in large part upon a stable and predictable decisionmaking process that differs dramatically from that properly employed by the political branches of government." *Id* Indeed, this Court addressed this very legitimacy in this case when it held that:

> For fourteen years the Legislature has worked to bring the public school finance system into conformity with constitutional requirements as declared by this Court To announce now that we have simply changed our minds on matters that have been crucial to the development of the public education system would not only threaten havoc to the system, but would, far more importantly, undermine the rule of law to which the Court is firmly pledged.

West Orange-Cove Consol. Indep. Sch. Dist v. Alanis, 107 S.W 3d 558, 585 (Tex. 2003).

B. No compelling reasons exist to overrule prior case law

The State advances several reasons why this Court should capitulate on requiring a constitutional system of public education, none of which are meritorious The State first argues that because the Constitution delegates the provision of public education to the Legislature, the Court erroneously presumed to determine whether the Legislature is performing this duty in

accordance with constitutional requirements. While the judiciary may not interfere with discretionary decisions committed exclusively to the Legislature, this is true only if that discretion is unaccompanied by any constitutional restrictions.

For example, ordinarily "the courts have no power to interfere with the exercise of discretion by the legislature, in regard to [taxation,] a matter exclusively confided to it by the constitution, simply because it may be unjust." *Norris v. City of Waco*, 57 Tex. 635 (1882). However, that is true so long as "no constitutional restriction exists upon the taxing power." *Slater v. Ellis County Levee Improvement Dist*, 120 Tex. 272, 280, 36 S.W.2d 1014, 1016 (1931). Thus, although the power to tax is committed exclusively to the legislative department, the judiciary is still the judge of whether those taxes comport with requirements that those taxes are, for instance, equal and uniform or for a public purpose *See, e.g., State v. Federal Land Bank*, 160 Tex. 282, 329 S.W.2d 847 (1959) (determining whether ad valorem taxes imposed by the State were equal and uniform), *Bullock v. Calvert*, 480 S.W.2d 367 (Tex. 1972) (determining whether taxes had been levied by the State for a public purpose).

Likewise, in *Edgewood Indep. Sch. Dist. v Kirby*, 777 S W.2d 391, 394 (Tex. 1989) (*Edgewood I*), this Court determined that the duty to establish a

public school system "is not committed unconditionally to the legislature's discretion, but instead is accompanied by standards By express constitutional mandate, the legislature must make 'suitable' provision for and 'efficient' system for the 'essential' purpose of a 'general diffusion of knowledge.'" Just as taxes are within the discretion of the Legislature, but are constrained by the constitution to be "equal and uniform" or for a "public purpose" as determined by the judiciary, so the public education system is the responsibility of the Legislature, subject to the courts' determination that it meets the constitutional obligation to be "efficient," "suitable" and provide a "general diffusion of knowledge" There is nothing within the *Edgewood I* decision or other Texas jurisprudence that would convince any reasonable jurist that it is in error on this point [2]

The State next argues that article VII, section 1 does not provide the judiciary with sufficient guidance to enunciate legal standards and thus its strictures will not support a justiciable claim. They contend that because there is still litigation regarding the constitutionality of the public school system sixteen years after this Court's opinion in *Edgewood I*, there are ipso

[2] The State cites to decisions from other jurisdictions in support of their argument that this Court erroneously interpreted the Texas Constitution on the justiciability of Article VII, section 1 However, "the decisions of the courts of other states interpreting constitutional provisions similar to ours are, at best, only persuasive, and never stare decisis, of the meaning of our Constitution" *Hall v Baum*, 452 S.W.2d 699, 704 (Tex. 1970). These decisions, however, are not uniform and there are many other state court decisions in accord with this Court's, *see Edgewood I*, 777 S W 2d at 398, which does little to leave one "convinced" that this Court has erroneously determined that compliance with our constitution's education clause is justiciable

facto no legally enforceable requirements The State also maintains that the provisions of article VII, section 1 do not give sufficient guidance for its provisions to be self-executing. Neither of these arguments have sufficient merit to be compelling reasons for overruling prior case law

As to the continuing nature of this litigation as a ground for abandoning enforcement of the Constitution, one is "reminded of the adage defining chutzpah, where the man who kills both his parents throws himself on the mercy of the court because he is an orphan" *United States .v Masquelier*, 210 F.3d 756, 759 n.1 (7th Cir. 2000). Approximately three and one-half years after the *Edgewood I* opinion the Legislature enacted a school finance system that this Court held would pass constitutional muster upon full implementation. *Edgewood Indep. Sch Dist. v Meno*, 917 S W.2d 717, 727 n.2, 731-32 & n.12 (Tex. 1995) (*Edgewood IV*). The State, however, never fully implemented that system, instead transforming certain of its temporary inequities into permanent ones. The State now comes to this Court asking for clemency from the Constitution on the grounds that the school districts have filed additional litigation when the State is directly responsible for failing to implement a system that, had it done so, would have received this Court's approval.

The State cannot credibly argue that it is impossible to figure out what the Constitution requires, because it already has once It also cannot plausibly contend that the current litigation is evidence of unpredictable or random constitutional requirements when the Supreme Court predicted this exact suit would be brought unless the Legislature took additional steps to fund public education *Id.* at 738, 746. Moreover, unless the political branches are firmly committed to a particular constitutional principle, it may take successive rounds of litigation to ensure compliance with a constitutional mandate. That, however, is no indication that the constitutional rule is not susceptible to rational enforcement by the judiciary. Under the State's theory of lengthy litigation, the constitutional obligation of racial equality found in *Brown v. Board of Educ*, 347 U S 483 (1954), would have been relegated to a non-justiciable, aspirational goal due to the often extensive court rulings required for its implementation [3]

The State also argues that, contrary to the holding in *Edgewood I*, article VII, section 1 provides no grounds for an attack on the current

[3] For instance, as of 1999 one school desegregation case had been going on for thirty-four years, with a succession of opinions issued by the Fifth Circuit. *See Valley v. Rapides Parish Sch Bd*, 173 F 3d 944 (5th Cir 1999), *Valley v. Rapides Parish Sch. Bd*,118 F 3d 1047 (5th Cir 1997), *Valley v Rapides Parish Sch. Bd*, 702 F.2d 1221 (5th Cir 1983), *Valley v. Rapides Parish Sch Bd*, 646 F 2d 925 (5th Cir 1981), *Valley v Rapides Parish Sch. Bd.*, 434 F 2d 144 (5th Cir 1970), *Valley v Rapides Parish Sch. Bd*, 423 F.2d 1132 (5th Cir. 1970); *Valley v. Rapides Parish Sch. Bd*, 422 F.2d 814 (5th Cir 1970), *Hall v St Helena Parish Sch Bd*, 417 F 2d 801 (5th Cir 1969); *Adams v. Mathews*, 403 F 2d 181 (5th Cir. 1968), *Jones v Caddo Parish Sch Bd*, 392 F 2d 721 (5th Cir 1968), *Valley v Rapides Parish Sch Board*, 349 F 2d 1022 (5th Cir. 1965)

system because in order to sue under that provision it must be self-executing and supply a sufficient rule by which the Legislature's duty may be enforced *See, e g., Mitchell County v City Nat'l Bank*, 91 Tex. 361, 371, 43 S.W. 880, 883-84 (1898). This rule, however, only applies when the Legislature has failed to enact any legislation and someone seeks to enforce a private right under the Constitution in the absence of a statutory provision.

In the case relied on by the State, *City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 276 S.W.2d 798 (1955), the plaintiff claimed that the Constitution itself prohibited certain conduct rather than that an enactment of the Legislature violated the Constitution Although the Court held that the constitutional provision under consideration did not by its own terms forbid the activity at issue, its ruling has no applicability to the present case. To the extent that "all laws in conflict with [constitutional] prohibitions are void," all constitutional provisions "are self-executing" *Mitchell County*, 91 Tex. at 371, 43 S.W. at 883. As this Court expressly held in *Edgewood I*, article VII, section 1 provides "a standard by which this court must, when called upon to do so, measure the constitutionality of the legislature's actions." *Edgewood I*, 777 S W.2d at 394 The State has provided no compelling reasons to overrule this

holding and have the judiciary abdicate its role in ensuring a constitutionally sound system of public education.

Nor has the State given any convincing arguments for this Court to overrule its holding that school districts have standing to raise claims challenging the constitutionality of the State's public school system. *West Orange-Cove*, 107 S.W.3d at 583-84. This Court's standing test for governmental entities that challenge legislative enactments is straightforward and easy to apply. A political subdivision that "it is charged with implementing a statute that it believes violates the Texas Constitution," may seek a declaration that the statute is unconstitutional because its "interest provides the [entity] with a sufficient stake in [the] controversy to assure the presence of an actual controversy that the declaration sought will resolve." *Nootsie, Ltd. v. Williamson County Appraisal Dist.*, 925 S.W.2d 659, 662 (Tex. 1996) (holding that appraisal district had standing to challenge constitutionality of a tax-exemption statute on the ground that it violated constitutional provision allowing such exemptions). Indeed, this Court has "recognized that a municipal corporation or other government subdivision can bring a constitutional challenge based on a provision outside the bill of rights and its guarantees to 'persons' and 'citizens'" *Proctor v. Andrews*, 972 S.W.2d 729, 734 (Tex.

1998) (holding that city had standing to challenge constitutionality of statute that authorized certain employees to appeal adverse employment decisions to a third-party arbitrator on the ground that it impermissibly delegated legislative authority).

Given these clear and forthright rules for governmental standing, it is implausible that the Court would reach any other conclusion than that school districts have standing to challenge the efficiency, adequacy and suitability of the public school system. These are not challenges under the Texas Constitution's Bill of Rights and school districts are expressly charged with implementing the school system's requirements Consequently, their standing is not really in question and there exists no compelling reason for the Court to reconsider, let alone overrule, their prior decision in this case that school districts have standing to challenge the constitutionality of the public school system.

II. Texas' Public Education System is Not Constitutionally Adequate, Suitable Nor Efficient

The Texas Constitution provides that "[a] general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools." TEX CONST art VII, § 1 This

provision "requires the Legislature to meet three standards First, the education provided must be adequate; that is, the public school system must accomplish that 'general diffusion of knowledge essential to the preservation of the liberties and rights of the people.' Second, the means adopted must be 'suitable' Third, the system itself must be 'efficient'" *West Orange-Cove*, 107 S.W.3d at 563. The present system violates each of these requirements.

A. No particular level of scrutiny is necessary for reviewing legislation under article VII, section 1

Relying primarily on *Mumme v. Marrs*, 120 Tex 383, 40 S.W.2d 31 (1931), the State argues that this Court should review whether the Legislature's public school system is adequate or suitable under an equal-protection rational-basis test. However, this Court need not choose any particular level of scrutiny in this case because article VII, section 1 does not, and has never, utilized any such standard.

Although *Mumme* did apply rational basis scrutiny to the school finance plan it reviewed, it did so under an equal protection analysis, not under article VII, section 1. *Id.* at 397, 40 S.W 2d at 36 (applying rational basis scrutiny to determine if the "law secures due process and equal protection as required by the Constitution"). In none of the prior *Edgewood* decisions did the Court select any particular level of scrutiny for its

constitutional review That is because a level of scrutiny is incompatible with the type of review required by article VII, section 1

While "the Legislature has the sole right to decide *how* to meet the standards set by the people in article VII, section 1, . the Judiciary has the final authority to determine *whether* they have been met" *West Orange-Cove*, 107 S.W 3d at 563-64 (emphasis in original). Since *Edgewood I*, the Court has determined what those standards are and then simply determined whether the Legislature has satisfied them. *See id* at 564 n 12 ("'The people of Texas have themselves set the standard for their schools Our responsibility is to decide whether that standard has been satisfied .'" (quoting *Edgewood IV*, 917 S.W.2d at 726)). This type of review is inconsistent with the idea of applying a level of scrutiny, because such scrutiny essentially allows what would otherwise be impermissible if the Legislature has a sufficiently important reason to depart from the constitutional mandate.

For example, although the Texas Constitution prohibits the Legislature from denying or abridging "'[e]quality under the law because of sex, race, color, creed, or national origin,'" the courts will uphold a law doing just that so long as the Legislature had a compelling reason for enacting it. *See Bell v. Low Income Women of Tex* , 95 S W 3d 253,

257 (Tex. 2002) ("If we conclude that equality was denied because of a person's membership in a protected class, the challenged action cannot stand unless it is narrowly tailored to serve a compelling governmental interest.") (quoting TEX. CONST. art I, § 3a). The Constitution also prohibits the Legislature from levying "'State ad valorem taxes . . upon any property within this State,'" but there exists no compelling interest that would save such a tax from being declared unconstitutional. *See Carrollton-Farmers Branch Indep. Sch. Dist v Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 493, 502 (Tex. 1992) (holding that even if state ad valorem taxes were necessary to cure a constitutionality inefficient school system, this would not allow the Legislature to impose such a tax in violation of the constitutional prohibition) (quoting TEX. CONST art. VIII, § 1-e).

The mode of review for a state property tax under article VIII, § 1-e is the same as this Court uses for article VII, § 1—if the Legislature has violated the constitutional provision then it is the Court's duty to say so If a compelling state interest will not save a state property tax from being struck down, then neither will a simple rational basis Likewise, a rational basis will not save a state educational system that violates the requirements of article VII, section 1. Accordingly, any particular level of scrutiny, including the equal-protection rational-basis test the State

proposes, is incompatible with, and may not be incorporated into, this Court's review under article VII, section 1.[4]

B. The State's educational system is not adequate

The trial court found that the State's educational system was not constitutionally adequate 3 CR 843; COL 24, 4 CR 973. To pass constitutional muster, the State's educational system must be adequate It meets this standard by providing a general diffusion of knowledge to the school children of this State. *West Orange-Cove*, 107 S W 3d at 563 The West Orange-Cove ("WOC") Appellees argued at trial that a general diffusion of knowledge requires a meaningful opportunity for all students to acquire all the skills, knowledge and other requirements of state law According to the WOC Appellees, a meaningful opportunity requires those programs, such as extended year, tutoring and remedial classes, to give all students an opportunity to succeed, along with extra-curricular activities and other programs, such as AP courses, which either help keep students in school or reflect "'changing times, needs, and public expectations.'" *Id.* at 572 (quoting *Edgewood IV*, 917 S.W 2d at 732 n.14)

[4] In *Roosevelt Elementary Sch. Dist. v. Bishop*, 877 P 2d 806, 811 (Ariz 1994), the Arizona Supreme Court held that it "need not, however, resolve [the] conundrum" of what level of scrutiny to apply "because where the constitution specifically addresses the particular subject at issue, we must address that specific provision first" It then went on to hold that its educational system violated the "'general and uniform'" requirement in its constitution's education clause without reference to any level of scrutiny *Id.* at 812-16

The Alvarado Appellees agree with the WOC Appellees' arguments regarding what is required for adequacy and that the State's educational system fails to meet this constitutional standard.

Additionally, for the same reasons that the State's system for financing facilities is inequitable and inefficient for property-poor districts, *see infra* at 35-42, it likewise provides inadequate funds for those districts to provide facilities necessary to impart a general diffusion of knowledge to their students.

C. The State's educational system is not suitable

The trial court found that the State's educational system was not constitutionally suitable. 3 CR 843; COL 23-24, 4 CR 973. To be suitable, the State's public school system must provide Texas school children with "'access to that education needed to participate fully in the social, economic and educational opportunities in Texas'" *West Orange-Cove*, 107 S.W.3d at 580 (Tex. 2003) (quoting *Edgewood IV*, 917 S.W.2d at 736). Additionally, the Court has held that a "public school system dependent on local districts free to choose not to provide an adequate education would in no way be suitable." *Id.* If the Legislature employs "a means that need not achieve its end," then that means "would not be suitable" *Id.* at 584.

It is the judiciary's duty to determine if the Legislature has met this particular constitutional standard. Although the Legislature is the "sole authority to set the policies and fashion the means for providing a public school system," *id.* at 563, it "is not the sole arbiter of the constitutional standard." *Id.* at 581. Based upon this constitutional division of duties and authority, while the judiciary does not "undertake to review [the Legislature's] choices one by one, . . once policy choices have been made by the Legislature, it is the judiciary's responsibility in a proper case to determine whether those choices as a whole meet the standard set by the people in article VII, section 1." *Id.* at 582.

This Court has recognized that accountability is part of a suitable system, and that without it, no system will pass constitutional muster. As previously noted, if school districts are not required to provide an adequate education then the system is unconstitutional. Texas is not alone in this regard. *See, e.g., Claremont Sch. Dist. v. Governor*, 794 A.2d 744, 751-52 (N.H. 2002) (holding "that standards of accountability are an essential component of the State's duty to provide a constitutionally adequate education" and noting that this "view is shared by other jurisdictions"). However, simply adopting an accountability system does not satisfy the State's duty. Rather, when "the State chooses to use an output-based tool

to measure whether school districts are providing a constitutionally adequate education, that tool must be meaningfully applied" *Id* at 758 Moreover, as with any other component of either general diffusion of knowledge or a suitable system, the accountability provisions must reflect changing times, needs, and public expectations

The purpose of the accountability system is to ensure that school districts provide a general diffusion of knowledge *West Orange-Cove*, 107 S.W.3d at 580. Unless it fulfills this function, it is not suitable for its purpose and does not comport with the requirements imposed upon the Legislature by article VII, section 1 *Id* at 584 One way an accountability system may fail to achieve its intended purpose is if it fails to provide any sanctions for a district's failure to reach the statutory goals Thus, the New Hampshire Supreme Court held that its state's accountability system did not ensure an adequate education because, although it did provide assessment data for each district and school, it failed to require any response for deficient performance. The system was unconstitutional because school districts found inadequate were "merely encouraged to develop a local educational improvement plan . . [n]othing more is required" *Claremont*, 794 A.2d at 758 Because the state had "not provided a sufficient mechanism to require that school districts actually

achieve" an adequate education, its accountability system was not "meaningfully applied" and did not pass constitutional muster. *Id.*

Another way in which an accountability system could fail to ensure that districts provide an adequate education is to set the standards below what is required to provide a general diffusion of knowledge or fail to accurately measure the outputs such that few, if any, districts fail to meet the accountability criteria. *See West Orange-Cove*, 107 S.W 3d at 571 ("'[T]he Legislature may [not] define what constitutes a general diffusion of knowledge so low as to avoid its obligation to make suitable provision imposed by article VII, section 1.'" (quoting *Edgewood IV*, 917 S.W.2d at 730 n.8)). Such a system would be neither meaningfully applied nor a means that would necessarily achieve its end Because the State's accountability system, as found by the trial court, suffers from these flaws it does not ensure a delivery of a general diffusion of knowledge and is thus not a suitable system.

The State's accountability system rests primarily on test scores and dropout rates, both annual and longitudinal. Alv. Ex. 9031 at 7. As to the test scores, what is required of districts is so minimal as to not ensure that districts are providing a general diffusion of knowledge to their students. Students at the third, fifth and soon to be eighth-grade levels are required

to pass certain portions of the TAKS test in order to be promoted to the next grade level. Thus, third graders must pass the reading portion, fifth graders the reading and math portion, and in the 2007-08 school year, eighth graders the reading and math portions TEX. EDUC. CODE ANN § 28.0211(a)(1)-(3), (n). Similarly, in order to receive a diploma, each student must pass the TAKS exams for English language arts, math, social studies and science. TEX. EDUC. CODE. ANN § 39 025(a). Because the Legislature would not hold students back or prevent them from receiving a diploma unless they had failed to master essential skills, it is the legislative determination that these tests represent those critical skills necessary for receiving an adequate education.

While the students are given what equates to a 100% passing requirement, the districts are deemed acceptable if half their students fail English and social studies, sixty-five percent fail math and seventy-five percent fail science. Alv. Ex. 9031 at 7. This mismatch between what the Legislature expects of students and what it expects of those to which it has delegated part of its duty to educate those students shows that the current system of accountability is seriously misaligned with both its own expectations and those of the local communities in this State. The State itself has essentially conceded that its present passage levels are too low

because it has stated that at some uncertain future date the acceptable passing level for all tests will be seventy percent. Alv. Ex 9031 at 89. However, when and if these standards are ever implemented is left to the discretion of the Commissioner of Education, which the evidence shows has been exercised in such a manner as "to ensure that most districts and campuses fell upon the 'academically acceptable' side of the line, which is consistent with longstanding practice in Texas." FOF 32; 4 CR 864. As a former TEA official testified: "When the Commissioner sets the standard, the Commissioner is highly aware of how many districts by that chance might be affected. And I believe this system has been consistently set in such a way as to absolutely minimize the number of districts that would be declared to be low performing." 7 RR 196 [5]

Indeed, there can be no other explanation for the large disconnect between the high expectations of students and the low expectations of districts. If no fifth grader can get to the sixth grade without passing the math and reading portions of the TAKS test, then it cannot be acceptable performance for a school district to allow 65% of those fifth graders to fail the math test or 50% to fail the reading test. Similarly, if a student must pass the science portion of the exit-level exam to graduate, how can a

[5] As a result, out of approximately 1,031 school districts in the state the percentage of low performing districts between 1994 and 2002 ranged between 1% and 8%, except for 1995 and 2002, when it reached 3.3% and 1.6% respectively. State Ex. 16426 at 9.

district be providing an adequate education if it is allowed to let 75% of those students fail Since the constitutionally-required purpose of our school system is to ensure that all students receive a general diffusion of knowledge, these types of minimal expectations for our school districts offend article VII, section 1.

The State has argued for, and Alvarado Appellees do not question, a phase-in period for a new testing instrument such as the TAKS By the third year of its administration all students will be at the panel recommended level for a passing score Alv Ex. 9031 at 92[6] However, there is no phase-in for those students who must pass a particular portion of the test in order to be promoted to the next grade or graduate and thus the State's "phase-in" for school districts is indicative of the "longstanding practice" of applying a standard that is less than what is required for a general diffusion of knowledge in order to have practically no low performing schools.

Another way in which an accountability system may fail to achieve the necessary result is to design in it in such a way that it does not accurately measure the particular performance indicator at issue The trial court found that this is the case for the State's dropout indicators because

[6] During the phase-in period, what is acceptable as a passing score will be lower than the panel recommended score as determined by a standard-error-of-measurement ("SEM") unit State Ex 15974 at 1

they "understate the true number of students who fail to graduate" FOF 649, 4 CR 971. This was based upon evidence showing that the graduation rate for Texas eighth-graders over the past decade has been less than 75% for all students and less than 70% for minority student groups. FOF 650, 4 CR 971. Despite this abysmal dropout rate, the State's own figures have consistently shown that virtually all school districts have had a relatively low annual and longitudinal dropout rate. The reason for this difference is the State's system for assessing dropout data, which is systemically flawed

Starting in 1986 the Intercultural Development Research Association ("IDRA"), an independent research organization, started tracking attrition rates for Texas ninth graders and from then until the 1988-89 school year their research was consistent with TEA's reported dropout data Alv Ex. 9019 at 11-12. Between the 1990-91 and 2000-01 school years, however, the results reported by IDRA and TEA converged dramatically with TEA reporting a dramatic decrease in dropout rates while IDRA's figures showed an increase such that by the late 1990's the IDRA dropout rate was five times higher than that reported by TEA. Alv. Ex 9019 at 13.

In 1999, the House Research Organization issued a report which found that the State Auditor's Office had estimated that for 1996, TEA's

dropout figure included only half the actual number of dropouts. Alv. Ex 9019 at 13-14. By this time the State had instituted a system of leaver codes to track dropouts. Under this system there are approximately two dozen various codes that a school district can assign to a departed student, some of which count as a dropout, but most of which do not. Alv Ex. 9019 at 14; State Ex 15866 at 80-81 The introduction of this system, however, did nothing to increase the accuracy of the dropout figures

A review of the longitudinal dropout rates for the fifty largest districts between the 1990-01 and 2000-01 school years showed that approximately three-quarters of them consistently had an actual completion rate of less than 74%. Alv Ex. 9019 at 26-27 Moreover, because this is an aggregate number the completion rate for minority groups would be much less. Alv. Ex 9019 at 22 However, since the accountability system had been implemented, only four of these districts had been rated less than academically acceptable and that was only one time for each district, meaning that these fifty districts were rated academically acceptable or higher 99% of the time Alv Ex. 9019 at 27. Finally, a June 2004 Census Bureau report estimated that as of March 2003 there were approximately 632,000 Texas residents between the ages of 18 and 24 who had not graduated from high school Alv. Ex 9019 at 35, 833.

For this same time period, TEA dropout data would result in approximately 282,500 non-graduates in this age range while an independent analysis produces approximately 646,000 and 610,000 non-graduates for that age range using seventh- and eighth-grade longitudinal dropout analyses, respectively Alv. Ex 9019 at 39-40 Obviously, the Census Bureau data and the independent analyses correspond closely while the TEA statistics are less than half the number produced by the Census Bureau

When the Census Bureau ranks Texas dead last in the nation for high school completion rates for persons aged 25 and over, Alv Ex 9019 at 819, and third from the bottom for those aged 18-24, Alv. Ex 9019 at 34, 826-34, while at the same time practically all Texas school districts are rated academically acceptable or better shows that the system is not suitable for achieving a general diffusion of knowledge Unlike an indicator such as attendance rates that used to part of the system, keeping students from dropping out is critical to providing a general diffusion of knowledge

> For individual students, if a student doesn't even complete, graduate from high school, their life chances are greatly diminished in a variety of realms in terms of opportunities for higher education, in terms of opportunities for entering the military, in terms of opportunities for a living, decent wage For society, graduation, at least graduation from high school

> is terribly important because research, again, has shown that if young people don't graduate high school, their probability of ending up on welfare or ending up in prison are greatly increased relative to students who do complete high school

15 RR 19.

Unless we want to return to the days when an eighth-grade education was sufficient for competing in society, students who dropout obviously do not receive a general diffusion of knowledge *See, e g , Campaign for Fiscal Equity, Inc. v State*, 801 N E.2d 326, 337 (N.Y. 2003) (noting that "it may, as a practical matter, be presumed that a dropout has not received a sound basic education"). Moreover, as TEA's Associate Commissioner of Accountability and Data Quality testified, it is important to keep children in school "to keep [districts] from having students drop out of school in order to increase test scores." 25 RR 111, 135 *See Campaign for Fiscal Equity*, 801 N.E.2d at 339 (noting that the "state's [Regents Competency Tests] passage rates . . would surely be lower, but for the alarming number of students who fall behind or drop out and so do not take the exam").

Even if the State's accountability system accurately compiled and reported the number of dropouts, it would still allow every fourth student to leave school without having obtained a high school diploma. Alv Ex 9031 at 14 Although the State can set the levels it deems acceptable, it may

not make then so low as to abdicate is constitutional duty to provide a general diffusion of knowledge. A system that allows such a large number of ill-prepared students to enter society cannot be said to be diffusing knowledge over the general population of its school children

The Alvarado Appellees certainly understand the political pressure to set standards high for school children and low for school districts It allows the political branches to proclaim a world-class system while paying for one that is in reality less than adequate So long as a tiny fraction of school districts are ever labeled low performing, there will be much less political pressure to fund the promised system In the present case, the overwhelming evidence has been that the current system is not adequate, but one would never know that from the results of the State's accountability system.

The Constitution requires the Legislature to place education in a different and higher position than other budget items. *See Edgewood I*, 777 S.W.2d at 398 ("[T]he legislature's responsibility to support public education is different because it is constitutionally imposed.") The accountability system must be such that it sets standards that then will drive the funds necessary to achieve those standards Moreover, the Legislature may not set those standards so low that it can merely provide

the funds it wants without regard to currently providing a general diffusion of knowledge Contrary to the State's contention, Alvarado Appellees also do not advocate for a plethora of unaccredited schools Rather, the Constitution requires the State to institute an accountability system that truly reflects a general diffusion of knowledge and then provide the funds to school districts such that they can meet those standards Moreover, the Constitution does not require immediate results. It can and will take varying lengths of time and varying amounts of resources and assistance for districts to reach the constitutionally required standards. So long as the State has set appropriate standards and provided the means for school districts to consistently progress towards those standards, then it has satisfied its constitutional duty But the history of the TAAS implementation shows that standards must come first, because in that case over an eight-year period the acceptable passing percentage changed from a nominal 25% rate to only minimal 55% rate Alv. Ex. 9021 at 10; Alv. Ex. 9029 at 10 Because the Legislature has failed to establish constitutional standards along with the requirement of providing the funds to meet those standards, the current public school system is not suitable for its purpose and is thus unconstitutional

D. The State's educational system is not efficient

The trial court held that the State's system for financing facilities was not constitutionally efficient. 3 CR 843, COL 23-24, 4 CR 973. The State argues that the system is efficient because the overall educational finance system is adequate, there is no evidence that any school districts cannot obtain adequate facilities within the equalized system, and that the $.08 tax gap for facilities is efficient under article VII, section 1. None of these arguments are availing.

The State first contends that if it wins its appeal and reverses the trial court's judgment that the system is inadequate, then it necessarily must win its appeal regarding efficiency. However, this would be true only to the extent that this Court holds that both that facilities financing was adequate and that school districts could obtain this adequate financing for facilities "within the equalized program" *Edgewood IV*, 917 S.W.2d at 746.

The State next maintains that there is no legally sufficient evidence to support the trial court's finding that the school finance system's failure "to provide substantially equal access to funds for facilities, property-poor districts like the Edgewood Intervenors lack all the facilities essential to providing student a learning environment in which to attain a general

diffusion of knowledge." FOF 433, 4 CR 943. The Alvarado Appellees will leave it to the Edgewood Appellees to detail their supporting evidence, but copious amounts of evidence as detailed by the trial court show significant current deficiencies with property-poor district's facilities that keep them from providing their students with an adequate education FOF 297-432, 4 CR 924-43 This is particularly true with respect to the lack of science lab facilities, which prevent some property-poor school districts from providing students with hands-on science instruction that is critical to an adequate education FOF 353-78, 4 CR 931-35 There is thus more than sufficient evidence to show that many property-poor districts need additional facilities in order to provide their students with a general diffusion of knowledge. The only remaining question is whether they can obtain these necessary additional facilities within the equalized system

To acquire these necessary additional facilities, at this point all but the poorest of school districts would have to issue bonds outside of any equalized system and pay for those bonds out of local resources alone The only program available for equalizing "I&S" payments for additional facilities under Tier 3[7] is the IFA. *See* TEX. EDUC CODE ANN. § 46 001- 013 Districts are able to apply for assistance under this program to build,

[7] The equalization mechanisms for I&S taxes above the $1 50 available for "M&O" expenditures are typically called Tier 3

acquire or improve instructional facilities *Id* § 46.003(a) TEA ranks applying districts by their adjusted wealth and then approves applications up to the amount appropriated in ascending order of wealth *Id.* § 46 006 A district whose application is approved has approximately $.07 of its I&S tax rate equalized up to the rate of $35.00 per average daily attendance ("ADA") for the life of the bonds. *Id.* §§ 46 003(h), 005

During the last biennium, only 15 districts qualified for IFA, thus excluding all other districts from the equalized system for additional facilities funding. Edg Ex. 407 at 1 This meant that districts such as Poteet ISD, with approximately $64,000 in wealth per student had to rely solely on their own local resources for any additional I&S funding Looking only at those districts that sought IFA funding last biennium (which doesn't necessarily include the richest districts), one finds a ratio of 21.25 to 1 for access to funds in Tier 3 for Poteet ISD as compared to the wealthiest district to apply for IFA last year Edg. Ex. 407 at 1, 10[8] Because of its extremely low wealth, without IFA assistance Poteet was unable to issue any bonds without a massive tax increase in the neighborhood of $.30 to $.40 and thus was unable to issue any bonds at all

[8] When the wealth cap was enacted in 1993 it applied to maintenance and operations and I&S taxes, but in 1997 the Legislature repealed the cap on I&S taxes Alv Ex 9004 at 7 Thus, the wealthiest district that sought IFA funding last year was able to access the full amount of its wealth for I&S purposes

22 RR 80-81. This was the same situation for South San Antonio ISD, whose new $40 5 million dollar bond issue under IFA would have added $.07 to its I&S tax rate, but because no IFA was available it could not issue the bonds because the resulting $.28 tax increase would have placed it in excess of the $.50 legal limit on I&S taxes. FOF 400(a), 4 CR 938-39

The State essentially has no equalized system under which districts are able to finance additional facilities. The State, with respect to new facilities, has regressed back to the point where large disparities in local wealth dictated who could and could not finance capital construction and improvement. This Court's description of the former system held unconstitutional applies equally to the current financing system for new facilities:

> To put it graphically, in some areas of the state, education resembled a motorcycle with a 1000-gallon fuel tank, and in other areas it resembled a tractor-trailer rig fueled out of a gallon bucket. Some vehicles were flooded, some purred along nicely, and some were always out of gas. A fleet of such vehicles is not efficient, even though a few of them may reach their destination.

Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch Dist, 826 S.W.2d 489, 497 (Tex. 1992) (*Edgewood III*).

Under the prior system held constitutional in *Edgewood IV*, that portion of the Tier 2 tax base made available for facilities was guaranteed

Edgewood IV, 917 S.W 2d at 746. Although there was never a judicial determination as to whether the amount of equalized funding available was sufficient for districts' facilities needs, at least what was there was guaranteed. Currently, Tier 3 only equalizes funding for new facilities expenditures up to the amount funded each biennium by the Legislature. TEX EDUC. CODE ANN. § 46.006. This Court has previously held that in "setting appropriations, the legislature must establish priorities according to constitutional mandate; equalizing educational opportunity cannot be relegated to an 'if funds are left over' basis" *Edgewood I*, 777 S.W.2d at 397-98. To the detriment of those children in property-poor districts, the Legislature has provided only those funds that are left over to equalize financing for new facilities. This, the Constitution does not permit

The State argues that the Existing Debt Allotment ("EDA") makes the system constitutionally efficient because it has provided equalized funding for bonds previously issued and for which payments were made during the 2002-03 school year. TEX. EDUC. CODE ANN. §§ 46.032, .033. According to the State, this program will be reauthorized and thus will provide equalized funding for those districts ineligible for IFA, thus narrowing the tax rate gap on I&S funds to $.08. This argument is fallacious for two reasons First, the State asks this Court to determine the

constitutionality of a statute that has yet to be enacted. Second, the speculative nature of future reauthorizations of EDA makes it unavailable to property-poor districts ineligible for IFA

Before legislation is enacted, this Court is not empowered by the Constitution to pass upon its validity For example, a city council filed a declaratory judgment action to determine the constitutionality of a proposed city charter amendment before it had been voted on by the electorate. *Coalson v. City Council*, 610 S W.2d 744, 746 (Tex 1980) This Court held that because the proposed amendment might never be adopted, the city was seeking an impermissible advisory opinion The courts, "under our Constitution, do not give advice nor decide cases upon speculative, hypothetical, or contingent situations." *Id.* at 747 In this case, the State is asking the Court to render an advisory opinion to the effect that if EDA is reauthorized then the system will be efficient because debt not currently covered by IFA will then become covered by EDA The Court may not engage in such a review because no one, not the State, not this Court, and not even the Legislature at this point know if EDA will be reauthorized and if so in what form or for what amount *See, e g.*, TEX EDUC CODE ANN. § 46.034(d) (implementing proration in the event appropriations are insufficient to pay for all eligible debt payments) The

State may not rely on hypothetical and speculative legislation to support the constitutionality of the current system. The system must stand on its own without resort to what the Legislature may or may not do in the future.

Additionally, the mere possibility that EDA may be reauthorized is insufficient for the State to argue that property-poor districts should issue and pay their debt out of local resources now in the hopes of qualifying for EDA in the future. The trial court found that property-poor districts are not able to go ahead and issue bonds because of the financially catastrophic results that would ensue if EDA were not reauthorized. FOF 408-09; 4 CR 859. To the extent the State argues that the school finance system is efficient because of the possibility that the Legislature may catch those districts who have had to jump off the cliff is asking this Court to uphold a system that requires those districts to essentially play Russian roulette with their I&S funding. No system that asks this of its property-poor school districts can be considered efficient. Indeed, the mere possibility of future EDA funding is worth nothing to these school districts and is the same as if there were no possibility of such funding

The present system thus places those districts too "rich" to qualify for IFA, but too poor to issue bonds without enacting exorbitant I&S tax

rates, in a financing purgatory that leaves them without any access to funding for critical additional facilities. As predicted by this Court in *Edgewood IV*, the lack of a separate, guaranteed facilities component for the funding of facilities has rendered the school finance system unconstitutionally inefficient. *Edgewood IV*, 917 S.W.2d at 746 ("[T]he evidence at trial shows that the lack of a separate facilities component has the potential of rendering the school finance system unconstitutional *in its entirety* in the very near future.") (emphasis in original)

CONCLUSION

Based upon the foregoing, the Alvarado Appellees respectfully request this Court to affirm the trial court's judgment that the school finance system violates the officers, adequacy and suitability clauses of article VII, section 1 of the Texas Constitution.

Respectfully submitted,

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